THE HIGH COURT
BANKRUPTCY

[2021] IEHC 451
[Bankruptcy No. 6181]

IN THE MATTER OF A BANKRUPTCY SUMMONS BY NATIONAL BANK OF RAS AL-KHAIMAH TRADING AS RAKBANK AGAINST F.K.

BETWEEN

NATIONAL BANK OF RAS AL-KHAIMAH TRADING AS RAKBANK

APPLICANT

AND

F.K.

RESPONDENT

JUDGMENT of Humphreys J. delivered on Thursday the 23rd day of September, 2021

1. The respondent became a customer of the applicant bank on 16th June, 2013. The bank advanced a loan in 2014 in the amount of AED 1,250,000.

2. In mid-2016, the respondent decided to petition for his own adjudication in bankruptcy. A statement of affairs was prepared on 28th May, 2016 which unfortunately did not refer to the 2014 loan. The respondent says that this was down to his fear of intimidation from the applicant bank (see para. 10 of his supplemental affidavit).

3. The petition was lodged in June 2016 and he was adjudicated bankrupt on 20th June, 2016.

4. Subsequent to the adjudication a further loan application was made dated 13th October, 2016 in the amount of AED 1,260,000. Of that, only AED 398,636.95 was new money and the bulk of the 2016 loan was to pay off the 2014 loan. The interest on the 2016 loan was running at around AED 9,000 a month in 2017 according to the statements exhibited, and apparently the balance of the new money had run down to nil as of May 2017.

5. The respondent claims that many of the payments out of the account in 2016 to 2017 were for interest, and on the facts there is certainly an arguable issue about how much of the actual benefit of the loans really represents post-bankruptcy benefit to the respondent and how much is directly or indirectly attributable to the pre-bankruptcy loan.

6. In essence the whole 2016 transaction has very much the character of a restructure of the 2014 loan, and in that regard the respondent says at para. 10 of his supplemental affidavit that the bank insisted on the restructure and forced it on him with threatening and harassing behaviour.

7. The respondent did not acknowledge the 2016 loan in his dealings with the Official Assignee. He was discharged from bankruptcy on 20th June, 2017.

8. In the meantime, the bank was engaging in determined efforts to recover the money and by 1st September, 2017 the respondent's solicitors were contacting the Superintendent in charge of Kilkenny District about alleged unlawful harassment by way of debt collection. They stated that the debt collection efforts had jammed the switchboard of the

respondent's employer and were "extremely aggressive". Much correspondence in this regard was exhibited and some of this was not effectively answered on behalf of the bank.

9. The bank submits that the correspondence does not show that there was harassment at the time of the restructure, but for present purposes it is sufficient to say that such a finding or inference would be reasonably available to a court if it accepted the respondent's evidence at the trial.

10. A demand for a balance of AED 1,320,604.98 was allegedly made on 3rd December, 2018. The affidavit on behalf of the bank is by David Sheahan, Director of Coyle White Devine Ltd. trading as Coyle White Devine Solicitors of Amersham, Buckinghamshire, HP6 6FA, who apparently issued the demand on behalf of the bank.

11. The bank applied for a bankruptcy summons, and that application was first listed on 13th July, 2020. On that occasion Pilkington J. indicated that she would need to be further persuaded by the alleged creditor before granting liberty to issue and serve a bankruptcy summons in circumstances where no judgment had been obtained or executed against the proposed respondent.

12. Ultimately on 14th December, 2020, a bankruptcy summons was issued by order of O'Connor J. That was served on 2nd February, 2021 and a motion was filed by the respondent on 16th February, 2021 seeking an order dismissing the bankruptcy summons. That motion, with which we are now concerned, was heard on 28th June, 2021, 15th July, 2021 and 19th July, 2021.

The test for setting aside a bankruptcy summons

13. Section 8(6) of the Bankruptcy Act 1988 provides that: "(6) The Court— (a) may dismiss the summons with or without costs, and (b) shall dismiss the summons if satisfied that an issue would arise for trial."

14. There are, therefore, two issues on an application to dismiss a bankruptcy summons:

    (i). Would an issue arise for trial? That should be a real, substantial issue and, if a factual matter, must have some credibility going beyond mere assertion and going to an issue that requires to be litigated outside the bankruptcy process (see *Ennis Property Finance Designated Activity Company v. Carney* [2019] IECA 71, [2019] 2 JIC 2007 (Unreported, Court of Appeal, 20th February, 2019), *per* Irvine J. (Edwards and Baker JJ. concurring), at para. 37).

    (ii). If not, is it nonetheless appropriate in the discretion of the court to dismiss the summons?

15. Sanfey and Holohan in *Bankruptcy Law and Practice*, 2nd ed. (Dublin, Round Hall, 2010), pp. 49 to 50, advance the argument that the grounds to set aside a summons are limited and that in order to challenge the validity of a summons one might have to submit to being adjudicated bankrupt and then show cause against the adjudication. I'm afraid that

I don't agree. The learned authors suggest that the issue of a summons can "hardly" be described as an order of the court, but on the contrary the issue of a summons *is* on foot of an order of the court (an order made, like any similar order, after hearing an application made in open court by the creditor concerned, grounded on an ex parte docket and affidavit with relevant exhibits). Such an order (since made *ex parte*) can be set aside on the application of any affected party who was not heard, in accordance with general principles that apply to any other form of *ex parte* order (which is what is sought here).

16. There is a specific provision in the Bankruptcy Act 1988 allowing orders to be reviewed (s. 135), but a specific provision isn't necessary because the general jurisdiction to revisit an *ex parte* order applies anyway. But s. 135 certainly reinforces the point here. Furthermore, the procedure of waiting to be adjudicated and then applying to show cause is very cumbersome and would have a disproportionate impact on the rights of the debtor. The learned authors admit this at p. 50 by saying that in practice an application to challenge the validity of a summons on wide grounds would be allowed. But I think that such a practice is not only permissible *de facto*, but also *de jure*; and is in particular a much more proportional way of addressing any points that an alleged debtor wishes to make at the initial stages of proceedings.

17. I now address the potential issues for trial as well as the question of discretion in accordance with the scheme envisaged by s. 8 of the 1988 Act.

Improper reliance on the Bankers' Books Evidence Act 1879

18. There was some argument at the hearing about whether the bank was entitled to rely on the Bankers' Books Evidence Act 1879 as amended or alternatively could rely on the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. However, I do not think that argument is hugely relevant here. An application for a bankruptcy summons is an interlocutory application, so hearsay is permissible in principle with means of knowledge being stated.

Lack of evidence of law in Dubai

19. While the respondent complains that there is a lack of admissible evidence as to the legal framework in Dubai, he has not established that it would be essential to have such evidence in order for the bankruptcy summons to be valid. It can be assumed in principle, no matter what jurisdiction we are talking about, that if a loan is made there is a liability to repay it. I will return later to the specific issue of the law of Dubai in relation to imprisonment for debt.

Entitlement of the deponent to act or give evidence on behalf of the creditor

20. Mr. Sheahan says that he is authorised to act on behalf of the bank and it seems to me that that is sufficient for present purposes, especially since he was the author of the letter of demand (see *Ulster Bank Ireland Ltd. v. O'Brien* [2015] IESC 96, [2015] 2 I.R. 656). The authorities relied on by the respondent, particularly *Ex parte Torkington* (1873-74) L.R. 9 Ch. App. 298 and In *Re Hussey* [1987] 9 JIC 2301, 1987 WJSC-HC 1762 (Unreported, Hamilton P., 23rd September, 1987) turn on their own somewhat different facts.

Effective discharge arising from previous bankruptcy

21. The effect of the previous adjudication of bankruptcy is to discharge any debt owing as of the date of adjudication. It is clear that the 2016 loan was largely used to pay off the 2014 loan which was a pre-adjudication debt. That it seems to me raises a number of distinct and reasonably arguable defences for a trial.

22. Those defences are as follows:

    (i) Firstly, it is reasonably open to the respondent to argue that the 2014 debt was discharged by the adjudication and consequently the restructuring of the alleged liability in 2016 amounts to an impermissible attempt to revivify a discharged debt.

    (ii) The second possible defence is that even if some effectively new money was made available to the respondent (which he disputes on the grounds that the alleged new money in fact ended up servicing interest), the amount of such truly new money may have been below €20,000 which is the statutory threshold for adjudication.

    (iii) Thirdly, even if there was genuinely new money, and if this was over the amount of €20,000, it is reasonably open to the respondent to argue that the amount of liability in the summons was overstated and an overstatement of that amount, even if on either version the sum due is over €30,000 could still be a defence: see *Gladney v. Tobin* [2021] IESCDET 67 (Unreported, Supreme Court, 14th June, 2021). In that case the Supreme Court gave leave to appeal in relation to the following question: "Does any overstatement of a claim of debt in bankruptcy cause the dismissal of the petition or does it suffice that, making all due allowances, at least €20,000 is due no matter how overstated a bankruptcy summons is in amount?" The overstatement argument has some existing authority in its favour: see *Minister for Communications v. M.W.* [2009] IEHC 413, [2010] 3 I.R. 1 *per* McGovern J.

Evidence of duress and harassment

23. The respondent has put forward sufficient *prima facie* evidence of excessive contact in terms of debt enforcement that is capable of raising an issue regarding duress and harassment. The respondent's case is that the bank and/or a debt collection agency were continuously phoning from Dubai or India, such contacts coming through an entity known as Stockslegal as well as Coyle White Devine Solicitors. The respondent has offered evidence of such harassment and duress "affecting health, occupation and ability to work" according to the affidavit of his solicitor, Catherine Allison, of 29th June, 2021 at para. 3. On this evidence, the respondent's solicitors were told that they were "harbouring a criminal" by debt collectors and the debt collection calls were disruptive to their work.

24. The evidence also is that there was a bombardment of calls to the respondent's employer as well as to his solicitors. The respondent (perhaps understandably) believed that this affected his reputation at work.

25. In particular, the demands were accompanied by reference to the possibility of imprisonment in the United Arab Emirates. The bank's lawyers have sought to account for that as merely a statement of the law of the UAE as it currently stands. But imprisonment for debt in the UAE is, on the (admittedly limited) evidence, not automatic. A creditor can make a criminal complaint on foot of debt in Dubai, but is not obliged to do so. In such circumstances, the effort by the bank's solicitors to say that the reference to imprisonment was "merely a reflection of the legal position in regard to indebtedness in that State and was set out to inform him of the seriousness of the position" (3rd affidavit of David Sheahan, para. 16) falls flat, because it leaves open the arguable defence that the bank and its agents have acted unconscionably. Such a reference to imprisonment for debt carries with it the unstated but necessarily implied threat that the bank will or may make the necessary application to have the mechanism for imprisonment triggered. Assuming inability to pay, that would be a serious violation of accepted standards of fundamental human rights. A point I tried to make in *An Taisce v. An Bord Pleanála (No. 2)* [2021] IEHC 422 para. 34, in slightly different words, is that if something is unlawful, it is also unlawful to threaten that something. That holds whether the threat is made in knockabout political discourse or in the ostensibly more dignified form of solicitors' correspondence.

26. Article 11 of the International Convention on Civil and Political Rights provides that "[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." A similar provision is contained in art. 1 of protocol 4 to the ECHR. The use of wording that carried the necessary implication of an intent to take action that would result in a contravention of these standards would give rise to an arguable defence to the effect that it would be unconscionable to allow a creditor to recover in circumstances where it had inflicted such a threat on the respondent, or engaged in any other harassment or unacceptable debt recovery tactics. I hasten to add that this should not be taken as a finding critical of the law of the UAE, because it may well be on further examination that imprisonment can't be imposed in a case of inability to pay. However, unfortunately, questions of foreign law in the common law system are questions of fact, and there isn't any evidence of such a clause in this particular case. That doesn't mean it doesn't exist, just that the respondent has raised a sufficient arguable defence on the basis of the evidence that I *do* have.

27. The foregoing amounts to a potential defence because it would be unconscionable in terms of the public policy of the State to allow an alleged creditor to recover where improper means were being used to enforce an alleged debt, if such means were established at trial (either in the form of harassment generally or improper threats of imprisonment in particular). While the bank has denied that there is evidence of harassment, much of the alleged harassment is set out clearly in contemporaneous solicitors' correspondence, and we also have an affidavit from the respondent's solicitor personally. All of this goes far beyond mere assertion for the purposes of the approach in *Ennis Property Finance Designated Activity Company v. Carney* [2018] IEHC 429, [2018] 7 JIC 1603 (Unreported, Costello J., 16th July, 2018).

Discretion

28. Aside from the foregoing, the court has an inherent jurisdiction to dismiss the summons, which is recognised by the term "may" in s. 8(6)(b) of the 1988 Act. If I am wrong that the foregoing factors either individually or collectively are not in themselves sufficient to require the automatic dismissal of the summons, I would rely on them either individually or alternatively in combination as raising sufficient concerns as to the correctness of the steps taken by the bank as to warrant the making of an order to dismiss the summons in the discretion of the court in all of the circumstances.

29. There is a further and related factor relevant to discretion, which is the absence of a judgment for the sum allegedly due. The sum demanded by the bank is not on foot of any judgment of the court and it is clear that Pilkington J. saw this as a *lacuna* requiring explanation (even though on a later date O'Connor J granted the bank's application). The court does have jurisdiction in the particular circumstances of any given case to consider that it would be preferable if a judgment was obtained prior to there being any question of a bankruptcy summons. If that approach was taken here it would raise the question of enforceability of any such judgment if obtained in the UAE, and would also raise the question of what defences would be available if the judgment was sought to be obtained in Ireland. In all the circumstances, it seems to me that even if the summons wasn't otherwise being dismissed, it should be dismissed on grounds that the circumstances are such here that a judgment should have been obtained first. At the risk of labouring the point, since the order to issue the summons was obtained *ex parte*, the court can at the *inter partes* stage revisit any aspect of the matter including whether any view taken by the court when making the *ex parte* order should be allowed to stand after full consideration.

Order

30. I would, therefore, dismiss the bankruptcy summons. Subject to consideration of any written submission to the contrary within 14 days from delivery of the judgment, costs would follow the event in favour of the respondent against the applicant, including reserved costs and, for the avoidance of doubt, the costs of written submissions.